(15)

JAN 5 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

RAY POLITO,
Petitioner,
vs.
WILLIAM MOLASKY and DOROTHY MOLASKY, MERCHANTS MOTOR FREIGHT, INC., and HERVEY WILLIAMS,
Respondents.

No. 839

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

N. MURRY EDWARDS,
Pierce Building,
St. Louis, Missouri,
GEORGE C. DYER, II,
721 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for writ of certiorari..... 1-7

Jurisdiction 1

Summary statement of matter involved..... 2

The questions presented..... 4

Reasons relied on for the allowance of the writ..... 5

Brief in support of petition..... 8-18

I. Under the federal statutes and cases, if there be more than one defendant, all of the defendants must be liable to be sued in the federal court or jurisdiction cannot be entertained by the federal court. There is no diversity of citizenship such as will sustain federal jurisdiction unless the controversy is between citizens of different states... 8

II. The complaint and the entire record in this case showed only that plaintiff and defendant Hervey Williams were citizens and residents of the State of Missouri..... 9

III. This Court has always held that it will determine the fundamental question of the jurisdiction of the Court from which the record comes; that it will review this question of jurisdiction even where it has not been raised or suggested by the parties 15

Conclusion 17

Cases Cited.

Bors v. Preston, 111 U. S. 252..... 16

Colony Coal & Coke Corp. v. Napier, 28 F. Supp. 76.. 8

De Vost v. Twin State Gas & Elec. Co. et al., 250 Fed. 349 12

Harrington v. Great Northern Ry. Co., 169 Fed. 714.. 14
Hay v. May Co., 271 U. S. 318, 46 S. Ct. 318..... 11
Highway Construction Co. v. McClelland, 15 F. (2d) 187 12
Jewell v. Cleveland Wrecking Company of Cincinnati, 111 F. (2d) 305..... 13
M. C. & L. M. Railway Company v. Swan, 4 S. Ct. 510, 111 U. S. 379..... 16
Mitchell, Insurance Commissioner of California, v. Maurer, 55 S. Ct. 162, 293 U. S. 237..... 17
Treinies v. Sunshine Mining Co., 60 S. Ct. 44 (308 U. S. 66)..... 8
Wetherby v. Stinson, 62 Fed. 173 (Seventh Circuit Court of Appeals)..... 9

Statute Cited.

Judicial Code of 1911, Sec. 240 (as amended by Act of Feb. 13, 1925), Sec. 347, 28 U. S. C. A..... 2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

RAY POLITO,
Petitioner,
vs.
WILLIAM MOLASKY and DOROTHY MOLASKY, MERCHANTS MOTOR FREIGHT, INC., and HERVEY WILLIAMS,
Respondents.
No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari be issued to review the final judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit.

JURISDICTION.

Petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit from orders of the District Court of the United States for the Eastern District of Missouri overruling petitioner's motion to remand the cause to the Circuit Court of the City of St. Louis, Missouri, and from a judgment on the merits in favor of defendants (respondents here) and against plaintiff (petitioner here). On November 10, 1941, the United States Circuit Court of Ap-

peals affirmed said judgment in a written opinion reported at 123 Federal (2d) 258. Petition for rehearing was overruled by said Court on November 26, 1941, and issuance of mandate stayed for thirty days from December 6, 1941, to permit the filing of this petition for writ of certiorari.

Under Section 240 (as amended by Act of Feb. 13, 1925) of the Judicial Code of 1911 (Sec. 347, 28 U. S. C. A.), this Court has jurisdiction to review by certiorari this opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner Ray Polito, as plaintiff, instituted a suit in the Circuit Court of the City of St. Louis, Missouri, against William Molasky, Dorothy Molasky and Merchants Motor Freight, Inc., as defendants, to recover damages for personal injuries sustained by plaintiff when the fire truck upon which he was riding as a city fireman was struck by a tractor and trailer truck. The cause was removed to the District Court of the United States for the Eastern District of Missouri upon a removal petition filed by defendant Merchants Motor Freight, Inc. This removal petition (Rec. p. 12) alleged that plaintiff and defendants Molasky were citizens and residents of the State of Missouri and defendant Merchants Motor Freight, Inc., was a citizen and resident of the State of Minnesota, and, further, that defendants Molasky were fraudulently joined as parties defendant. The petition further alleged that a separate and severable cause of action existed between plaintiff and defendant Merchants Motor Freight, Inc.; that there was a diversity of citizenship between said parties, and that the amount in dispute was in excess of $3,000.00.

Plaintiff filed his first motion to remand the cause to the

state court, which motion was overruled. Plaintiff then, on May 9, 1940, filed an amended petition in the District Court of the United States joining Hervey Williams as a party defendant. This amended petition (Rec. p. 27) alleged that defendants Molasky and Hervey Williams were citizens and residents of the State of Missouri. Plaintiff then, on May 9, 1940, filed his second motion to remand the case to the Circuit Court of the City of St. Louis (Rec. p. 31). Defendant Merchants Motor Freight, Inc., filed an answer (Rec. p. 34) to said amended petition, which answer contained no statement or allegation whatsoever as to the citizenship and residence of defendant Hervey Williams. The Court ordered testimony heard on plaintiff's second motion to remand, and on August 5, 1940, overruled said motion. Subsequently defendant Hervey Williams filed a separate answer to plaintiff's amended petition, but failed to make any allegation or statement as to the citizenship and residence of said defendant Hervey Williams (Rec. p. 37). On October 4, 1940, plaintiff, by leave of Court, filed his second amended petition containing allegations as to the citizenship and residence of the parties identical to those stated in his amended petition of May 9, 1940 (Rec. pp. 53-59). By leave of Court the answers of the defendants theretofore filed to plaintiff's amended petition were refiled to plaintiff's second amended petition (Rec. p. 59). The case was ordered to trial on the merits and a verdict and judgment rendered and entered in favor of defendants and against plaintiff.

On the appeal taken to the United States Circuit Court of Appeals, said Court held in its opinion: (1) That the District Court properly overruled plaintiff's second motion to remand (Rec. 127); (2) that plaintiff's amended petition did not divest the District Court of jurisdiction, and that the District Court had jurisdiction to try the case on its merits (Rec. p. 127), and (3) that the judgment should be affirmed (Rec. p. 129).

THE QUESTIONS PRESENTED.

Only one major question is involved in this case so far as this petition is concerned. That question is: Did the United States District Court have jurisdiction of this cause at any time after May 9, 1940, when plaintiff filed his amended petition?

This question arises by reason of these facts, about none of which there is any dispute:

1. Plaintiff's amended petition, filed May 9, 1940, joined Hervey Williams as a party defendant. This amended petition alleged that Hervey Williams was a citizen and resident of the State of Missouri, the same state of which plaintiff was a citizen and resident. It further alleged that plaintiff's injuries were the result of the joint and concurrent negligence of all of the defendants.

2. Although defendants Merchants Motor Freight, Inc., and Hervey Williams filed separate answers to plaintiff's amended petition, neither of them made any allegation or statement whatsoever as to the state of which Hervey Williams was a citizen and resident.

3. No place on the face of the record did any allegation of defendant Hervey Williams' citizenship and residence appear except in plaintiff's amended petition and motion to remand, and in both of these pleadings it was alleged that he was a citizen and resident of the same state as plaintiff, to wit, Missouri.

The answer to this major question of jurisdiction is dependent upon the answers to the following subordinate questions:

1. Does the federal court have jurisdiction on the basis of diversity of citizenship where plaintiff and one of the defendants are alleged to be citizens and residents of the same state, and it is further alleged that plaintiff suffered

damages by reason of the joint and concurrent negligence of all of the defendants?

2. Does the filing of an amended petition which alleges and states no facts showing jurisdiction in the federal court (but, on the contrary, alleges facts showing the federal court to be without jurisdiction) deprive the federal court of jurisdiction to hear and determine the cause?

3. Where the face of the entire record shows no facts supporting federal jurisdiction, may the federal court nevertheless hear and determine the cause?

4. Where all of the pleadings in a cause contain only allegations as to citizenship which show the federal court to be without jurisdiction, and no issue is made up by the pleadings on the question of citizenship, may the federal court determine and decide that it has jurisdiction to hear and determine the cause, basing such decision solely on portions of testimony extraneous to the pleadings.

5. May the federal court consider matters other than those appearing on the face of the record proper to determine whether it has jurisdiction of a case?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Certiorari should be granted for the following reasons:

The opinion of the Circuit Court of Appeals in holding that the District Court properly overruled plaintiff's second motion to remand and properly entertained jurisdiction over the cause even to the extent of hearing and determining it on its merits:

First: Is a decision on a federal question in conflict with applicable decisions of the Supreme Court of the United States.

Second: Is in conflict with the applicable decisions of

the United States Court of Appeals for the Eighth Circuit and the United States Courts of Appeal for other circuits.

Third: Involves an important question of federal law which should be definitely settled by this Court.

Fourth: Is a case in which the jurisdiction of a United States District Court is questioned, and in which that Court was totally without jurisdiction.

The judgment of the Circuit Court of Appeals for the Eighth Circuit is final and is erroneous, and this Honorable Court should require the case to be certified to it for its review and determination.

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and forward to this Court a full and complete transcript of the record of the proceeding in said Court in the case numbered and entitled on its Docket 12,063, Civil, Ray Polito, Appellant, v. William Molasky and Dorothy Molasky, Merchants Motor Freight, Inc., and Hervey Williams, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that petitioner may have such other and further relief in the premises as the Court may deem proper.

Respectfully submitted,

N. MURRY EDWARDS,

GEORGE C. DYER, II,
Attorneys for Petitioner.

State of Missouri, }
City of St. Louis. } ss.

N. Murry Edwards, of lawful age, being first duly sworn, upon his oath states that he is counsel for Ray Polito, the petitioner, and that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

N. Murry Edwards

Subscribed and sworn to before me this 31st. day of December, 1941.

My commission expires March 26, 1943.

Evelyn Burke

Evelyn Burke,
Notary Public, City of St. Louis,
State of Missouri.

(Seal)